

This proviso is not present in our Bankruptcy Act. It was first introduced in England in 1913 by the Bankruptcy and Deeds of Arrangement Act 1913 (see s 16(2)(ii)), and it is significant that no amendment, however, was made by that Act or subsequent Act in respect of an understatement of a judgment debt in a bankruptcy notice. One can only conclude that if such understatement was of the same character as an over-demand in a bankruptcy notice, the legislature would have extended the proviso to cover it as well.

In the result, the objections raised on behalf of the debtors to the respective petitions fail. As there is no dispute on the judgment debt which is still unpaid, I propose to make a receiving order and an adjudication order against each of the debtors.

*Objections dismissed.*

Solicitors: *Tan Rajah & Cheah; Warren Khoo & Co.*

Reported by *Yap Shao Sin*

## K-Rex Finance Ltd v Yap Swee Hong & Anor

HIGH COURT (SINGAPORE) — SUIT NO 99 OF 1982  
RAJAH J  
4 OCTOBER 1990

*Banking — Deposit taking — Documentary credits — Guarantees — Plaintiffs not carrying on banking business, unable to sue on banking transaction — Banking Ordinance (Cap 155) [HK], s 5*

*Contract — Guarantees — Privity*

The plaintiffs were a Hong Kong company registered to undertake the business of deposit taking, which was its principal business. On 21 June 1979 the plaintiffs requested the Ka Wah Bank in Hong Kong to issue an irrevocable letter of credit for US\$672,500 in favour of one PT Nassalabi. The plaintiffs made this application on the request of Gobee Co, also of Hong Kong. By a guarantee dated 1 June 1979, the defendants, in consideration of the plaintiffs extending credit facilities to the said Gobee Co, jointly and severally agreed to guarantee the due payment of the same. On 27 July 1979 the plaintiffs invoiced Gobee Co for US\$739,742.29 being the total amount incurred on the documentary credit transaction. Gobee Co never paid. On 9 June 1980 the defendants entered into a compromise agreement with the plaintiffs to pay the sum of US\$739,742.29 by 1 December 1980 if the plaintiffs would discontinue all legal proceedings. The defendants failed to pay. The plaintiffs sued the defendants on the guarantee and the compromise agreement.

**Held**, dismissing the action:

(1) The plaintiffs, not being party to the letter of credit transaction, could not sue the defendants on the guarantee because the guarantee was in consideration of someone making advances or otherwise extending credit facilities to Gobee Co. The guarantee not covering advances or credit facilities offered by Ka Wah Bank, the defendants were not liable under the guarantee on the letter of credit.

A (2) The plaintiffs not being bankers cannot sue on a banking transaction.

(3) There being no liability under the guarantee, the claim under the compromise agreement was misconceived.

[*Editorial Note:* The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 94 of 1990.]

B **Legislation referred to**  
Banking Ordinance (Cap 155) [HK] s 5

*Raj Singam (David Ang and Ong Chee Kwan with him) for the plaintiffs.*

*Cheong Yuen Hee (Stephen Loke Chi Teh with him) for the second defendant.*

*Cur Adv Vult*

C **Rajah J:** The plaintiff is a company incorporated and registered on 17 March 1978 under the laws of Hong Kong and having its registered offices at 21F, Ka Wah Bank Centre, 224-234-A Des Voeux Road Central, Hong Kong. In June 1978 the plaintiff was registered in Hong Kong under the Deposit Taking Companies Ordinance as a deposit taking company. The principal business of the plaintiff was that of a deposit-taking company. The company applied for a moneylenders licence and was granted such a licence on or about 20 June 1978 for one year. The licence lapsed on 21 June 1979 and remained lapsed until 2 November 1979. The licence was renewed again from 3 November 1979 to 2 November 1980 and again from 3 November 1980 to 2 November 1981 (DB2). From the above it is clear that the plaintiff was not a licensed moneylender for the period 21 June to 2 November (both dates inclusive) 1979.

F The plaintiffs by para 2 of this statement of claim plead that:

G (1) by terms of a continuing guarantee in writing dated 1 June 1979 in consideration of the plaintiffs' making advances or otherwise extending credit facilities to one Gobee Co Ltd, of 402, General Commercial Building, 154-164 Des Voeux Road Central, Hong Kong, the defendants together with one Vincent Yoong Tat Kwong (since deceased) jointly and severally agreed with the plaintiffs to guarantee the due payment of the same;

H (2) on 21 June 1979, the Ka Wah Bank Ltd in Hong Kong, on the application of the plaintiffs who in turn had been requested by the said Gobee Co, duly issued an irrevocable letter of credit for US\$672,500 in favour of one PT Nassalabi Co of Kalimantan, Indonesia to pay for timber ordered by one Cheung Hsia Trading Co Ltd, of 311-2 Third Floor, Jin Jin Building, 242 Liu Shen First Road, Kaonn Yisung, Taiwan. Subsequently, one Winsome Taiwan Enterprises Corp of the same address was substituted for the said Cheng Hsia Trading Co;

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- (3) the said PT Nassalabi Co accordingly shipped the timber to the said Winsome Taiwan Enterprises. On 27 July 1979 the plaintiffs invoiced the said Gobee Co for the amount of US\$739,742.29 being the total amount incurred by the plaintiffs in payment for the timber;
- (4) the plaintiffs have not received payment from the said Gobee Co and/or the defendants of the said amount of US\$739,742.29 or any part thereof in spite of demands for payment. This said amount with interest charges has escalated to US\$820,244.42 as of 29 December 1981.

Further and in the alternative, by a contract in writing dated 9 June 1980 in consideration of the plaintiffs, at the request of the defendants together with Vincent Yoong and the said Gobee Co, foregoing or discounting all legal and other proceedings which the plaintiffs were entitled to maintain against the said Winsome Taiwan Enterprises and one Tsui Wen Hung in respect of the said sum of US\$739,742.29, the defendants, Vincent Yoong and the said Gobee Co jointly and severally agreed, *inter alia*:

- (a) to guarantee payment by 1 December 1980 of US\$739,742.29 together with interest thereon at such rate as the plaintiffs' bankers charge from time to time, costs, charges and expenses incurred by the plaintiffs in recovering the said sum of US\$739,742.29;
- (b) to guarantee payment to the plaintiffs of accumulated interest by two instalments on 5 July 1980 and on 5 October 1980;
- (c) to pay to the plaintiffs all moneys deposited by the plaintiffs into the courts of Taiwan for the purpose of legal and attachment proceedings against the said Winsome Taiwan Enterprises;
- (d) to indemnify the plaintiffs against any loss, damages and expenses sustained or incurred by the plaintiffs by reason of any instructions given to solicitors of the plaintiffs in Taiwan to abandon or discontinue legal proceedings and by reason of any action or inaction on the part of the plaintiffs at the guarantors's request.

To date, the plaintiffs have not received payment of all moneys due under the written contract of 9 June 1980 from the said Winsome Taiwan Enterprises, the defendants and/or the two other guarantors. The amounts as of 29 December 1981 stand at US\$820,244.42.

One of the defences raised by the second defendant is that:

- (1) the 'guarantee' alleged in para 2 of the statement of claim is illegal and unenforceable because at all material times, the plaintiffs were carrying on the business of banking without a licence, contrary to the

- A provisions of s 5 of the Banking Ordinance (Cap 155);
- (2) the 'contract' of 9 June seeks to secure payment alleged to be due under the 'guarantee' and is for the reasons set out herein tainted with the same illegality and similarly unenforceable.

B The issue before the court is whether the guarantee now before the court is an enforceable contract. The plaintiffs do not carry on a banking business. The principal business of the plaintiffs is that of a deposit taking business. They also carried on a moneylending business for which they carried a licence to do so from 20 June 1978 to 2 November 1981, except for a short period of 21 June 1979 to 2 November 1979.

C Mr Peter Kwok Khoo Hock, the chairman and director of the plaintiff company, in his evidence has set out the circumstances in which the plaintiffs are suing the defendants. He said:

D In the course of our business we had dealings with Gobee Co Ltd of Hong Kong, Singapore and Taiwan.

E In May and June 1979 we had dealings with Gobee Co Ltd. Gobee requested us to establish a letter of credit in their favour. PB9 (19 June 1979) is the date of the request. The agreement referred to PB9 is a general agreement for commercial business is as follows: 'When a customer comes and asks us to do business with them we must have some understanding with these people. Then we would want security. If they apply for a loan or loan facilities from us then we shall be able to give it to them. There were three from Gobee Co Ltd who were involved in the transaction. They were (1) Yap Swee Hong (2) Suen Wai Wing and (3) Brenda Lim Geok Eng. They asked us to grant them a letter of credit. Specimen signature card dated 11 June 1979 admitted and marked P4. Second specimen signature card admitted and marked P5 dated 11 June 1979. On or about the 11 June 1979 we would have agreed to grant the company letter of credit facilities. We never lent them any money. Exhibit P6 sets out the particulars of Gobee Co Ltd. There were six directors. They were (1) Vincent Yoong Tat Kwong (2) Cheng Chih Cheng (3) Santiago Quah (4) Loh Boon Huat (5) Gin Gin Tan and (6) Ong Yoke Mui. The second defendant is both a shareholder and director of the company. In P4 and P5 we have the signatures of only one of the directors, namely, Vincent Yoong. We then asked them for security for providing them with letter of credit facilities. They agreed to give us security in the form of a continuing guarantee given by Yap Swee Hong and Vincent Yoong and Mr Cheng Chih Cheng. The specimen signature card was in respect of the persons who could apply for the L/C.

F PB5 — Letter dated 5 June 1979 enclosing continuing guarantee marked P14. The continuing guarantee is perhaps still in Hong Kong.

G AB3/4 — When we received the guarantee there was nothing said about the limit of the guarantee. There was no statement by any of the guarantors that the amount guaranteed should be limited. The guarantee was signed by the guarantors on a printed form supplied by us. The defendants at no time said that the guarantee should be limited. They did not tell me that they would want a limited liability on the guarantee.

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PB9 was received by us after we had received the guarantee. The application for letter of credit was accepted. This letter of credit in favour of PT Nassalabi Co of Indonesia draft to be drawn on Gobee Co Ltd for US\$672,500. We approved the draft. This letter of credit was made pursuant to the agreement leading to the guarantee.

PB10 — Gobee Co Ltd requested that letter of credit be issued subject to the terms and conditions in PB10. We then applied to the Ka Wah Bank Ltd for an L/C to be drawn on us in favour of PT Nassalabi. Payment was made to Nassalabi by Ka Wah Bank under the L/C. L/C for the sale of 5,000 cubic metres of Indonesian round logs (Indonesian origin).

PB11 — This is our application to Ka Wah Bank for L/C for US\$672,500 drawn on us. Notifying party in our L/C was Cheng Hsin Trading Co Ltd of 242 Lin Shen 1st Road, Kaohsiung Taiwan. There was a change in instruction. Cheng Hsin telexed us on 22 June 1979 to change notifying party to Winsome Taiwan Enterprises Corporation of 242 Lin Shen 1st Road Kaohsiung Taiwan (PB13).

On 29 June 1979 a telex was sent by Simon WH Tsai to John K Chan, a director of K-Rex Finance Ltd requesting further change of notifying party as in PB13. The L/C was transferable. Ka Wah Bank paid Nassalabi, the vendors of the logs.

In Hong Kong the Banking Ordinance came into force in 1964. Section 5 of the Ordinance enacts that except as may be provided in the Ordinance no banking business shall be transacted in Hong Kong except by a company which is in possession of a valid licence issued by the Government in Council authorizing it to transact banking business in Hong Kong.

On 21 June 1979 the Ka Wah Bank in Hong Kong on the application of the plaintiffs who in turn had been requested by one Gobee Co of Hong Kong issued an irrevocable letter of credit for US\$672,500 in favour of one PT Nassalabi Co of Kalimantan, Indonesia to pay for timber ordered by one Cheng Hsin Trading Co Ltd of Taiwan. Subsequently one Winsome Taiwan Enterprises Corp of Taiwan was substituted for the said Cheng Hsin Trading Co. As the Ka Wah Bank was the issuer of the irrevocable letter of credit, the plaintiffs, not being party to the transaction, cannot sue the defendants on the guarantee because the guarantee was in consideration of someone making advances or otherwise extending credit facilities to one Gobee Co Ltd. The guarantee not covering advances or credit facilities offered by Ka Wah Bank, the defendants are not liable under the guarantee on the irrevocable letters of credit. The plaintiffs not being bankers cannot now sue on a banking transaction.

As an alternative ground for their claim the plaintiffs rely on the compromise agreement of 9 June 1980. This alternative ground in view of there being no liability under the said guarantee the claim under the compromise agreement is misconceived. The plaintiffs' claim against the second defendant totally fails and his action is dismissed with costs.

Further, Mr Peter Kwok in his evidence says, 'The name of the company has been changed from K-Rex Finance Ltd to K-Rex Enterprises Ltd. This was done on 23 September 1986.' In view of this it seems to me that the present action is not maintainable by the plaintiffs, K-Rex Finance Ltd, and should properly have been in the name of K-Rex Enterprises Ltd. The action is dismissed with costs.

*Action dismissed.*

Solicitors: *Drew & Napier; Boey Ng & Wan.*

Reported by *Mathavan Devadas*

### Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd

D HIGH COURT (SINGAPORE) — COMPANIES WINDING-UP  
NO 254 OF 1989  
CHAO HICK TIN JC  
28 SEPTEMBER 1990

*Companies and Corporations — Winding-up — Whether counterclaims substantial and bona fide — Whether petition for winding-up should be stayed*

E *Words and Phrases — 'Neglected' — Companies Act (Cap 50, 1988 Ed), s 254(2)(a)*

The petitioning creditors ('PC') petitioned to wind up the company ('C') on the ground that C is deemed insolvent under s 254(1)(e) read with s 254(2)(a) of the Companies Act (Cap 50, 1988 Ed). For several years, PC and C had a business relationship in the construction industry and were involved in several projects. The petition is based on a debt arising under two judgments totalling \$544,346.43. PC served a statutory notice of demand on C but C did not satisfy the sum demanded after 21 days. C admitted that it owes PC the said sum under the two judgments but says that by virtue of their bona fide counterclaims which in totality very much exceeded the debt owing from C to PC under the two judgments, C is justified in not complying with PC's statutory demand.

H The issues are, first, whether C's counterclaims against PC are bona fide and based on substantial grounds and secondly, even if they are based on substantial grounds, whether that is a sufficient basis to dismiss the petition or order a stay. At the eleventh hour, PC filed an affidavit introducing evidence on C's general insolvency.

**Held**, staying the petition:

(1) The counterclaims in respect of projects (ii) and (iii) are bona fide and based on substantial grounds and either of the two counterclaims exceed the amount of debt owing by C to PC under the two judgments.

I (2) The important word in s 254(2)(a) of the Companies Act is the word 'neglected'. Mere omission to pay a debt on demand does not of itself constitute neglect to do so within the meaning of that provision. The word 'neglect' necessarily implies some element of fault.